No. 313

Supreme Court of the United States

DES MOINES COUNTY, IOWA
AND STATE OF IOWA, PETITIONERS

vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR REVIEW ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AND ARGUMENT OF PETITIONERS
REFERENCE TO OFFICIAL REPORT

B. C. CONN,
Burlington, Iowa,
J. A. DAILEY, JR.,
Burlington, Iowa,
J. C. PRYOR,
Burlington, Iowa,
Attorneys for Petitioner, Des Moines County, Iowa.

JOHN HALE,
Burlington, Iowa,
Special Assistant Attorney General of Iowa,
Attorney for Petitioner, State of Iowa.

Service of the within petition is accepted and receipt of copies acknowledged this ..... day of ....., 1945.

.....,
Solicitor-General of the United States.

Receipt of copies of the within Brief and Argument is acknowledged this ..... day of ....., 1945.

.....,
Solicitor-General of the United States.

INDEX

Petition for Review on Writ of Certiorari

Brief and Argument

CODE CITATIONS

CASE CITATIONS

MISCELLANEOUS AUTHORITIES

Supreme Court of the United States

DES MOINES COUNTY, IOWA
AND STATE OF IOWA, PETITIONERS

vs.

UNITED STATES OF AMERICA, RESPONDENTS

PETITION FOR REVIEW ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

I.

STATEMENT OF THE MATTER INVOLVED

This case is a condemnation proceeding instituted by the United States Government under the authority of *Sec. 257, Title 40 U. S. C., 25 Stat. 357; the War Purposes Act of July 2, 1917, as amended, 50 U. S. C. Sec. 171; the Declaration of Taking Act of February 26, 1931, 40 U. S. C. Sec. 258a,* and *the Appropriation Act of April 5, 1941, 55 Stat. 123* (R. 2-3, 6). The Government had acquired by purchase and condemnation over 20,000 acres of land near Burlington, Iowa, as a site for the Iowa Ordnance Plant. On June 18, 1943, it filed its petition in condemnation, praying that the "full, fee simple title" to "all culverts, ditches, public roads and highways, except State Highway No. 16, traversing the lands described" within the boundaries of the Iowa Ordnance Plant area, "be vested in the United States of America," subject to existing easements for public utilities, for railroads, and for pipelines, (R. 4, 7). A Declaration of Taking was filed on the same date, $1.00 being deposited as estimated compensation. Prior to the filing of the Declaration of Taking, however, the Government had actually taken possession and control of the highways, and excluded the public therefrom. It was stipulated

that the actual date of taking was March 1, 1941. (R. 114). State Highway No. 16, above mentioned, is not involved as it had been legally vacated (R. 23, 67-68). What is involved is a system of graded and gravelled highways, comprising 48.25 miles, including culverts, bridges and guard rails. (R. 169). Some of these roads have been in use since the days of Iowa as a territory. (R. 116 et seq.).

The District Court for the Southern District of Iowa, after the trial of the issue of just compensation, or damages, found as a fact: "That the full, fair, reasonable, and actual value of the roads and highways *** on the 1st day of March, 1941, (the date of taking), was the sum of $175,000.00, which I find and award as just compensation for the taking of said roads and highways, with the bridges, culverts and improvements thereon." This award with interest resulted in a judgment for $208,687.50 against the United States.

In the District Court all of the evidence as to the value of the property taken was offered by Petitioners herein. It was uncontroverted except for the contention of Respondent herein that it was liable only for nominal damages in the sum of $1.00. To evidence offered by Petitioners as to the cost of providing certain alternate roads and the need for them, the District Court sustained the objections of the United States that the evidence offered was not based upon the proper measure of damages. (R. 167,300.)

Thereafter the Government perfected an appeal to the Circuit Court of Appeals for the Eighth Circuit. The Court reversed the judgment of the District Court and ordered the case remanded for new trial. The reversal was ordered on the grounds:

1. That the amount allowed by the District Court as just compensation was not shown by the evidence "to have any relation to any financial loss or out of pocket expense" which was caused by the taking, and hence, was not the true measure of damages.

2. That the true measure of damages is the cost of constructing substitute roads, if they are necessary, whether that cost be more or less than the value of the roads taken.

II.

BASIS FOR JURISDICTION

Authority for the jurisdiction of this court appears in *U.S. Compiled Statutes, Sec. 1217; 28 U.S.C.A., Sec. 347.*

III.

THE QUESTIONS PRESENTED

The questions presented are as follows:

1. Are petitioners entitled to recover the fair value of the roads, bridges and culverts taken?

2. Are Petitioners limited in their recovery to the cost of substitute roads if any are required?

3. Was the Circuit Court of Appeals in error in reversing the District Court judgment for error induced by Respondent?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals decided an important question of Federal Law which has not been, but should be, decided by this Honorable Court, to-wit: The measure of damages to be applied to public highways, including bridges and culverts, taken by the United States Government in condemnation proceedings.

The Petitioners respectfully state to the Court that similar cases are already in litigation or soon will be in litigation in many other jurisdictions, and that in the decisions already made by the District Courts, there has been a wide divergence of opinion as to the measure of damages to be used.

2. The Circuit Court of Appeals decided an important

question of law affecting the relative rights of the Federal Government and a sovereign state.

3. The Circuit Court of Appeals in its opinion decided an important question of Federal Law in conflict with the fundamental principles of condemnation law and constitutional provisions, to-wit: that the condemnee should be made whole for the property taken from him.

4. The Circuit Court of Appeals in its opinion invaded the sovereignty of the state. The decision would permit the taking by the Federal Government of the property of a state without the payment of compensation.

Wherefore, your petitioners pray this Honorable Court to require by writ of certiorari that this cause be certified to the Supreme Court for determination by it as provided by statute.

B. C. CONN,
Burlington, Iowa,

J. A. DAILEY, JR.,
Burlington, Iowa,

J. C. PRYOR,
Burlington, Iowa,

Attorneys for Petitioner, Des Moines County, Iowa.

JOHN HALE,
Burlington, Iowa,
Special Assistant Attorney General of Iowa,
Attorney for Petitioner, State of Iowa.

Supreme Court of the United States

DES MOINES COUNTY, IOWA
AND STATE OF IOWA, PETITIONERS

vs.

UNITED STATES OF AMERICA, RESPONDENTS

BRIEF AND ARGUMENT OF PETITIONERS

REFERENCE TO OFFICIAL REPORT

This case is officially reported in 148 Federal Reporter, 2nd Series, page 448.

GROUNDS FOR JURISDICTION OF THIS COURT

1. The Circuit Court of Appeals decided an important question of Federal Law which has not been, but should be, decided by this Honorable Court, to-wit: The measure of damages to be applied to the taking of highways by the United States Government in condemnation proceedings.

2. The Circuit Court of Appeals decided an important question of law affecting the relative rights of the Federal Government and a sovereign state.

3. The Circuit Court of Appeals in its opinion decided an important question of Federal Law in conflict with the fundamental principles of condemnation law and constitutional provisions, to-wit: That the condemnee should be made whole for the property taken from him.

4. The Circuit Court of Appeals in its opinion invaded the sovereignty of the state. The decision would permit the taking by the Federal Government of the property of a state without the payment of compensation.

STATEMENT OF THE CASE

The Circuit Court of Appeals for the Eighth Circuit reversed the judgment of the District Court for the Southern District of Iowa, awarding Petitioners compensation in the amount of $175,000.00 for 48.25 miles of graded and gravelled highways, including culverts, bridges and guard rails, included in the Iowa Ordnance Plant Area and remanded the case for a new trial to determine the compensation upon the basis of the cost of providing a system of substitute roads. The Circuit Court of Appeals so held notwithstanding the fact that in the trial in the District Court, Respondent had objected to all evidence offered by Petitioners as to the cost of substitute roads, *as not based upon the proper measure of damages,* and pursuant to these objections all such evidence was rejected. (R. 74-77-78, 167, 299-300).

SPECIFICATION OF ERRORS

1. The Court of Appeals erred in reversing the case and remanding on account of the measure of damages employed in the District Court, because the condemnee is entitled to be made whole in respect to the property condemned.

2. The Court of Appeals erred in reversing the case for alleged error which was induced by the Respondent, the Appellant in that Court.

ARGUMENT

I.

In Condemnation, Compensation Must Be Made for the Property Taken at its Value at Time of Taking, Undiminished by Lack of Necessity for Subsequent Maintenance of the Property

The Circuit Court's opinion essentially is as follows: The Federal Government can take state and county highways and close them to the public generally. If the state, or county, has not alrady available a substitute system of roads, the Federal Government is required to pay damages based on the cost of a substitute system. If, disregarding any question of their convenience, such roads are already available, the Federal Government pays the state or county nothing.

The court in its opinion said, "If it is unnecessary to replace the roads or to provide substitutes for them, the appelles have suffered no money loss and have been relieved of the burden of maintaining the roads taken."

It is obvious that any such theory of compensation will have a far reaching effect upon the property and rights of the several states. Thus a state may have spent millions of dollars in the construction and erection of bridges, overpasses, and pavement upon a given section of highway. Should the United States decide to erect an arsenal along this highway, taking the land on both sides thereof for that purpose, the question of compensation would depend solely on whether or not the citizens of the state have other roads on the perimeter or adjacent to the arsenal site. If such roads were already available, the state would receive nothing from the Government for the millions of dollars in value of roads taken.

Under this rule of condemnation without compensation, a Federal Officer, in determining the site for a federal project, would not hesitate to close and condemn highways representing a heavy investment of state funds. Those states, which, by the taxation of their citizens, have already complete high-

way systems in existence would be especially vulnerable, since they would already have "substitute roads" in existence. The more comprehensive the highway system, the less chance for the representative of the taxpayers to receive compensation for them.

The Petitioners recognize the supremacy of the Federal Power in the fields of National Defense and like matters. The exercise of this power may cause inconvenience to the citizens of the various states, as, for example, the necessity of driving many miles to get around a military establishment. At the same time, the court cannot be unmindful of the necessity of maintaining the integrity of the several states. Thus, a check is placed upon the Federal Government in the exercise of the power of condemnation, even as to the property of the several states, by the requirement of just compensation. The vice of the Circuit Court's opinion is that this check or balance is completely removed, placing the property of the states at the mercy of the whims or desires of the officers of the Federal Government.

The Circuit Court speaks of the lack of money loss and relief from the burden of maintaining the roads taken. This would seem to ignore the reasons for highways. They are not built solely for the convenience of the lands bordering them, but primarily for the traveler. They are used for communication between different localities. This is especially true today with the urbanization of our country and the widespread use of automobiles.

Thus, this language of the Circuit Court may seem to be grim humor to a resident of Des Moines County who is forced to drive many more miles to bring his produce to market, or whose farm is depreciated in value due to its recently acquired greater distance from the County Seat. Similarly, should the Federal Government condemn the shortest route between two neighboring cities, even though a good "substitute system" is available, we doubt if the residents would agree that there was no money loss involved to the State and communities involved. It might be reasonably argued that whatever damages the citizens of a state damages the state itself, since the prosperity and well-being of a state is but a reflection of that possessed by its citizens.

It may be argued that the National Defense requires many sacrifices from our citizens for which they receive no money compensation. But this sacrifice should be nation-wide. There is no justification for taking the property of the citizens of Des Moines County and the State of Iowa, unless the same sacrifice is required of all citizens of a like class, any more than there would be to apply the Selective Service Act exclusively to the State of Iowa. The rule of this decision, if permitted to stand, will apply to all cases in the future, whether of military necessity or public improvements of a general nature. In the post war period, there is apt to be a vast increase in Federal public works, involving the taking of many highways by the Federal Government. This argument, therefore, especially when viewed as to its applicability in times of peace is demonstrated as unsound.

The rule of the Court of Appeals appears to be that a condemnee is not to be compensated, if, regardless of the value of the property at the time of taking, the condemnee is to be thereafter relieved of the cost of maintenance. This proposed amendment to the law as applied under the Fifth Amendment to the Federal Constitution is not tenable. It would drastically dispose of a very large class of cases dealing with property held for the service and use of the public; but it would be not only manifestly unjust to local taxpayers but serve as release of every deterrent to extravagant spending by the national government. The only limit to grandiose Federal projects would be the extent of official imagination; since the most valuable property built by state and local taxation could be acquired gratis, so far as the Federal treasury is concerned.

II.

The Fifth Amendment Guarantees Compensation to a State or Division Thereof as well as to Private Persons.

This theory of condemnation without compensation finds no support in the previous decisions of the Circuit Court of Appeals. On the contrary, it was established in the Bedford, Wheeler Township and other cases that a state or other political subdivision is protected by the Fifth Amendment as against

the United States taking property without compensation for its fair actual value. As to such property owner the Federal Government comes "as a stranger." (*Town of Bedford vs. United States* (*C. C. A. 1.*) 23 Fed. 2d 453. *United States vs. Wheeler Township,* 66 Fed. 2d 977. *United States vs. Certain Lands in the Town of New Castle,* 167 Fed. 783.)

III.

With Respect to Property Having No Market Value Cost of Reproduction Is a Proper Element to Consider in Determining Fair Value.

While there is no mention of it in the Circuit Court's opinion, it was the contention of Respondent that the property values found by the District Court were erroneous in that they were based upon evidence not of market value but of reproduction cost. It had been stipulated (R. 23-24) that prior to their closing, the roads "sought to be condemned"

> "were used generally by the general public as public highways and said highways and roads were further used by land owners and lands adjacent to the Iowa Ordnance Plant area for the purpose of securing access to their lands and . . by parties desirous of access to the lands owned by adjoining land owners,"

and that

> "there was no likelihood of any abandonment by Des Moines County, Iowa, of any of said roads or the use of said real estate, but on the contrary, it was intended the public use of said real estate for highway purposes should continue indefinitely . . ."

Some idea of the way in which the condemned road system served the adjacent territory and its relation to the road system of the county and state may be gained by an examination of the maps, Exhibits 1 and 48 (R. 82, 99, 301, 295).

No one claims that such property is bought and sold on the market, or that it has a market value; but that a highway in use as such,— and these roads were in use as such when

taken,—has value, it should not be necessary to argue. It is not income producing property, and when such property is valued, the element of cost must enter. (R. 153) Such evidence is proper in a situation such as this.

> "The lack of other and better evidence than reproduction cost has been especially prominent with respect to so-called service properties, such as schools, club-houses, and churches, where value to the owner is the accepted measure of compensation." (*Orgel on Valuation under Eminent Domain, Page 592.*)

> "It is now the prevailing rule that estimates of reproduction cost may be introduced on direct examination whenever the buildings are well adapted to the land on which they stand." (*Ibid 587*)

> "In the case of non-profit-making or service properties, cost of replacement is regarded as cogent evidence of value although not as in itself the standard of compensation." (*Ibid 122*)

The trial court understood the principle stated by Orgel, recognizing that cost of reproduction is a proper element to consider in arriving at just compensation in this case. (R. 105)

IV.

Public Highways of a State or Division Thereof Are a Proper Subject for Condemnation by the Federal Government.

The right of the Petitioners under the Fifth Amendment should not be affected by the fact that as to a portion of the property, the highways without bridges or other improvements, their ownership was that of a perpetual easement, rather than a fee. As was held in *Brooklyn Eastern District Terminal vs. City of New York,* 139 Fed. 2d 1007, easement rights are subject to compensation. This is true whether the easement be for road or railroad purposes. The very fact that the present action was instituted is a recognition that such rights are a proper subject for condemnation and the payment of compensation under the Fifth Amendment to the Constitution of the United States.

That the highway easements were procured and roads built and maintained by means of local taxes was undisputed. That the highways and bridges in question were in general public use until Respondent excluded the public therefrom and that at the time there was no prospect of their abandonment was stipulated. (R. 24)

Under the circumstances in this case, the rights of the Petitioners in these roads, though they may be called in the nature of easements, were the same as a fee so long as they were exercised. Petitioners have been deprived by the Respondent of the possibility of exercising their rights. In general it is well settled that in condemnation, the taking of a determinable fee is on the same basis as the taking of a fee simple absolute.

United States vs. 119.15 Acres, 44 Fed. Supp. 449
United States vs. 2086 Acres of Land, 46 Fed. Supp. 411
United States vs. 16 Acres of land, 47 Fed. Supp. 603
People of Puerto Rico vs. United States, 132 Fed. 2d 220
Restatement of Property, Vol. 1, Sec. 53
City of St. Louis vs. Western Union Telegraph Co., 37 L. Ed. 380, 148 U. S. 92, 13 S. Ct. 485

V.

The "Substitute Road" Theory.

It is especially difficult to comprehend the Circuit Court's theory of no money loss, when we consider the single item of bridges. According to the undisputed testimony, the bridges located on the roads taken had a value of $68,183.00. These bridges have been appropriated by the United States for its own use, some in their original location and others on new sites to which they have been removed. Can it be that, in this condemnation proceeding instituted by the Government, this property can be taken without compensation being allowed? If the Government had requested the County Supervisors for vacation of these highways and that request had been granted, the State of Iowa and Des Moines County would unquestionably have had the right to remove the bridges from the vacated roads. But under the theory of the

Circuit Court, if a substitute highway is available, no compensation is to be allowed for this property actually taken and used by the Government. It can hardly be argued that no loss has been sustained, since these bridges have a definite value and could have been placed by the road building authorities on other roads. If the Fifth Amendment means anything, the answer is too obvious to require argument.

The same situation exists with reference to the highways exclusive of bridges and culverts. As has been shown, the petitioners had what amounted to fee simple title thereto from both practical and legal aspects. The undisputed testimony showed the value in terms of cost of reproduction less depreciation, and the award made by the trial court was substantially less than such value. It cannot be disputed that Petitioners have been deprived of their property, nor can it be denied that such property had and has substantial value. Hence, it is difficult to perceive the theory, if any, upon which the Circuit Court of Appeals reached the conclusion that the award was not shown to have any relation to any financial loss or out of pocket expense to the Petitioners.

The Petitioners respectfully show the court that the decision of the Circuit Court of Appeals, permitting the taking of this property without compensation, finds no support in the previous decisions of the Circuit Courts of Appeals. If the previous cases are carefully reviewed, they will be found in effect to support the following theory, to-wit:

A. If the state is forced to spend more for the value of alternate highways than the value of the roads taken, the measure of damages is the cost of constructing the alternate roads. This rule is founded in justice. The duty of the condemnor is to make whole the condemnee for the loss sustained.

B. In many instances, because of the topography of the country, the cost of constructing the alternate highways is more than the old roads were worth. It is only fair in such cases that this additional cost be taken as the measure rather than the value of the thing taken.

In the case of *United States vs. Wheeler Township*, 66

Fed. 2d 977, the roads taken had been partially flooded for many years prior to the condemnation.

> "It is undisputed (page 983) that the other roads are not and never have been adequate, are 'poor,' many of them not much more than trails."

The Government (the appellant) contended that the measure of damages was the "physical property the condemnee had when the condemnation occurred." Since this would not have met the cost of constructing the new roads, the Appellee contended that :

> "The measure of damages is the difference in that type of road, with the lake in the state of nature and with the lake raised to the treaty level."

The court said :

> "The contest is between the roads as they are and a type of road reasonably passable under the treaty lake levels."

In the case of *Jefferson County, Tennessee vs. Tennessee Valley Authority*, 146 Fed. (2) 564 (566) cited by the Circuit Court of Appeals, the value of the roads taken was $671,546.00 while the cost of constructing new roads which the Authority paid for under contract was $1,876,393.00.

> "Thus it appears that the plaintiff has already received from the Authority more than a million dollars more than it would have received had the Authority only paid the reproduction cost new of the roads flooded by it."

In the case of *Wayne County, Kentucky vs. the United States*, 53 Ct. of Claims 417, the court makes this significant statement :

> "the plaintiff has been compelled to abandon said part of said old road and in lieu thereof to lay out, open, and construct a new road at the reasonable cost to it of $2.034.32.
>
> "The new road is *a better road than the old one*, due to its higher elevation and better location and to the fact that an underlying stone foundation for part of its dis-

tance, *but it was constructed on the only available site at a reasonable cost . . "* (Emphasis supplied)

The Circuit Court also cited in its decision the recent case of *Mayor and City Council of Baltimore vs. United States,* 147 Fed. 2d 786. It is significant that the Circuit Court based its decision in that case upon the theory that the value of the streets and alleys was reflected in the value of the lots. Further, the court said: "When a street is opened in Baltimore the municipal authorities customarily assess the costs upon the adjacent property owners on the ground that they have received benefits of equal amount."

This is not the method of paying for the costs of the acquisition of easements, construction, and bridges, for roads in the State of Iowa. In Iowa, as in many other states, the cost of rural road construction and maintenance is paid from taxes assessed against all the property of a county, including that located in cities and towns. In addition, funds are made available from gasoline and franchise taxes levied upon a statewide basis. *Sections 4560, 4644.01, 4644.06, 4644.07, 4644.08, 4644.12, and 4644.11 Code of Iowa, 1939, as amended.*

Nor can it be said that in Des Moines County, the value of the roads was reflected in the value of the adjoining property. Unquestionably, a farm located upon a good highway is worth more than a farm that is not, but only a fraction of the improvement would be reflected. Thus, a farm of 640 acres, located upon both sides of a mile of highway which because of bridges and other improvements cost $30,000.00 to construct, would not thereby be increased in value $30,000.00.

Further, the Circuit Court in the Baltimore case said: "In the pending case, the City had made no improvements whatsoever to the alleys when they were taken by the United States." This is quite different from the case at bar where the value of the bridges above was approximately $68,000.00, where the value of the culverts was placed at $33,229.00, and the value of grading and surfacing, $46,000.00. (R. 169)

With the exception of the Baltimore case, in all of the cited cases decided by Circuit Courts of Appeals, the cost of providing the substitute system was in excess of the value of

the roads taken. The Baltimore case is easily distinguishable on the facts and on the law. The mere fact that the courts in attempting to give protection under the Fifth Amendment found in these cases the fair damage measure to be the cost of providing substitute facilities does not establish that this criterion is to apply in all cases. A fair reading of all of the decisions cited would not warrant any such conclusion.

VI.

The Circuit Court's Decision, in its Implications, Suggests a Dangerous Governmental Policy.

Even though viewed as calmly and dispassionately as possible, the opinion of the Circuit Court would seem to give an opportunity for a far reaching, unjustified, and unconstitutional extension of the Federal Power. What is to prevent a federal agency, dissatisfied perhaps with the state administration of a highway, from taking it over by condemnation? If the highway were left open, or other facilities were available, no compensation would be required. The same rule can be applied to docks and wharfage, open to free access of the public. Or perhaps the Department of the Interior might feel that it could better administer a park than the state or city, now the owner. True, it could be said that no money loss was incurred, and that the state was relieved of the burden of maintenance. In the location of federal power, irrigation and navigation projects will not the implications of this decision encourage the seizing and destruction of state and county highways and other like property?

If the highways, the parks, the wharves and all of the other property of a state devoted to public uses may thus be seized by the Federal Government upon some claim of national necessity, but without even the deterrent of payment required, if the states can thus be deprived of the very functions for which they were created; what will be their excuse for existence? Naturally, the Federal Government would have the right to police its own property, as is done now in federal parks and reservations.

It will undoubtedly be said that by right of condemnation

this power is already possessed by the Federal Government. But at least, prior to this decision, it was generally understood that a check was placed upon its use by requiring just compensation. The representatives in Congress of the State of New York might perhaps be hesitant to vote for the seizure of the property of the State of New Jersey, if they knew the New York citizens would be taxed for its payment. Some may say that this deterrent is of small value. That it is a deterrent to the unwise and improper use of the Federal Power, however, cannot be denied. Nor do we know of any case decided by this court where the Bill of Rights has been ignored because of the argument that the right protected was of doubtful value.

The Petitioners respectfully state to this court that this decision involves matters of great importance to the future of our nation. The right of the Federal Government to take the property of a sovereign state, by which it exercises functions as such, with or without compensation, is a matter of great national importance.

The Circuit Court of Appeals has determined that in certain cases this power can be exercised without the necessity of paying the compensation required by Constitution. Until this court passes upon this troublesome question, there will be confusion among the states as to their rights as against the Federal Government. Because this matter is, therefore, of public importance, because we believe that the Circuit Court erroneously decided an important matter of constitutional law, the Petitioners pray due consideration of this cause by the Supreme Court of the United States.

VII.

Reversal Should Not Be Based on Error Induced by Appellant.

Both the claim of Des Moines County (R. 30-33) and the claim of the State of Iowa (R. 48-51) were based upon the underlying theory that the Petitioners were entitled to recover not only for the property actually occupied in the Ordnance Plant area, but also for the additional cost of new highways and bridges made necessary by the taking of the highways and bridges within the area. This was largely based

upon an analogy to the taking of a portion of a farm where the measure of damages is the difference between the fair market value of the farm prior to the taking and the fair market value of the remainder immediately thereafter (R. 59) *United States vs. Grizzard*, 219 U. S. 180, 84 L. Ed. 165. At the trial, Respondent moved to strike the portion of both claims which sought to recover for damages on account of highways outside of the Ordnance Plant area (R. 58-65). Des Moines County offered as a witness one Arnold Staff, who is a farmer, a land owner, and a road patrolman, living in the vicinity of the Ordnance Plant, to show the necessity for construction of other highways as a result of the taking of those in the Ordnance Plant area. To this line of testimony the Respondent objected and the court sustained the objection (R. 74). The County thereupon made an offer to prove by Staff and numerous other witnesses (R. 75-77) that new highways were made necessary by reason of the taking by the Plant. To this offer, the Respondent objected on the ground that neither of the defendants could be compelled to build, alter or improve any highways (R. 77). This objection was sustained by the court (R. 78). The Petitioners herein further offered to prove by the entire membership of the Board of Supervisors of Des Moines County that new improvements were necessary and that, as such Board, they intended to make such improvements (R. 299). To this offer the Respondent objected on the ground of irrelevancy and immateriality *and not tending to prove the proper measure of damages*, which objection was sustained by the court (R. 300).

In this state of the record, the Respondent was not and is not in position to complain that the court did not base its award upon the cost of acquisition and construction of other highways. The Petitioners offered such proof as hereinabove stated and also offered to prove by the witness, Inghram, Des Moines County Engineer, that the fair and reasonable cost of construction of certain of the alternate highways would be $118,000.00 as of March 1, 1941, (R. 167). To the offer so made, Respondent objected on the ground of immateriality *and as not tending to prove the proper measure of damages or compensation*. This objection was sustained by the court (R. 167). The Government could not, therefore,

complain and cannot now maintain that the District Court erred in failing to apply as the measure of damages the cost of acquisition and construction of other highways. In the case of *Devine vs. Zimmerman*, 133 Fed. 2d 850, decided by the 8th Circuit Court of Appeals February 18, 1943, opinion by Judge Gardner, it was said:

> "In the lower court the defendant, both by motion to dismiss and by answer, urged that the court had no jurisdiction to require Margaret C. Devine and Nancy C. Devine to execute the note * * * * and hence the Court ought not to grant specific performance of the contract. In this view the Court apparently agreed with the defendant and if it erred in so doing the error was induced by defendants and cannot be urged by them. This is so elementary as not to require citations of authority * * *."

In the case of *Omaha Hardwood Lumber Company vs. J. H. Phipps Lumber Company*, 135 Fed. 2d 3, decided by the Circuit Court of Appeals for the 8th Circuit, April 9th, 1943, the court speaking through Judge Johnsen, said, at page 10:

> "A party can hardly ask appellant relief from matters in a judgment which were included in his own requested findings and conclusions, without some satisfactory showing of excusable mistakes, which he has first duly presented to the trial court."

In this view the court apparently agreed with the Respondent and if it erred in so doing, the error was induced by Respondent and cannot be urged by it. This is so elementary as not to require the citation of authority, but see *Law vs. U. S.*, 266 U. S. 494, 45 Sup. Ct. 175, 69 Law. Ed. 401; *Mercelis vs. Wilson*, 235 U. S. 579, 35 Sup. Ct. 150, 59 Law. Ed. 370; *Pitcairn vs. Fisher*, 8th Circuit 78 Fed. 2nd 649; *Union Electric Light and Power Company vs. Snyder Estate Co.*, 8th Circuit 65 Fed. 2d 297. Also see *Smails vs. O'Malley*, 8th Circuit, 127 Fed. 2d 410 at 414, opinion by Judge Thomas; *Ramming Real Estate Co. vs. U. S.*, C. C. A. 8th, 122 Fed. 2d 892 at 894 opinion by Judge Gardner.

We have shown from the record that from the inception of this case until it filed its Brief and Argument in the Circuit Court of Appeals, Respondent insisted that the cost of sub-

stitute highways is not the proper measure of damage. Under the decisions above cited, the Government was in no position to ask that this cause be remanded for the purpose of receiving evidence to prove damages suffered by Appellees, based upon the theory which it had theretofore insisted was wrong.

On this point, the Circuit Court said:

> "The appellees contend that the error complained of by the United States was induced by it and may not be used in this Court as a ground for reversal. The error is too plain and vital to be ignored for procedural reasons where the public interest is involved. See *Helvering vs. Rubinstein*, 8 Cir., 124 F. 2d 969, 972, and cases cited."

We believe we have shown that the District Court did not err in determining the proper measure of damages or the amount of damages so measured. If there was such error, however, it was clearly induced by Respondent. It is, of course, conceded that the public interest is involved. If the matter under discussion is procedural, the procedure deals with private rights as well as public interests. If the principle recognized by the authorities cited has any validity, its employment here is as well justified as in any of the cited cases.

The Helvering case, cited by the court below, does not present an exception to or in any way question the soundness of the rule here under discussion. It deals with another proposition entirely, viz: the right of an appellate court, in order to "prevent a miscarriage of justice" to "notice obvious errors even though not properly called to the attention of the trial court." The same court in that case expressly denied that a "defeated litigant" should be afforded "another day in court because he thinks that if he were given the opportunity to try his case again upon a different theory he might prevail." Neither do the cases cited in the Helvering case question the rule for which Petitioners contend nor suggest any reason for doubt as to its proper application here.

If the decision of the Circuit Court of Appeals is permitted to stand, Respondent will be "given the opportunity to try its case again," to take a "new hold" and proceed "upon a different theory" of damages, a theory Respondent successfully

contended in the District Court to be incorrect and unsound. Such a result is not permissible under either the Federal rule as set forth in the above cited cases nor under the Iowa Supreme Court decisions. Thus, in *Crawford vs. Wolf, et al.*, 29 Iowa 567 (573), the court said:

> "What all these objections may be as already intimated, assumed by the statement of the facts that the evidence was admitted under a rule adopted by the court under defendant's motion. It is, so to speak, a rule of defendant's own making; he cannot now be heard to object to it or complain of its evil effects."

And in the later case of *Westbrook vs. Ry. Co.*, 115 Iowa 106 (109) 88 N. W. 202, a condemnation case where the defendant condemnee had objected successfully to evidence offered as to value per acre, it was held that he could not thereafter complain that he was not allowed to show such value on cross examination. Referring to the Crawford case, the court said:

> "In Crawford vs. Wolf, 29 Iowa 568, it is held that a party cannot complain of the admission of evidence under a rule adopted by the court claimed to be erroneous, where such rule was adopted at the instance or upon the suggestion of the party complaining."

(See also *Lomack vs. Iowa Mutual Ins. Assn.*, 155 Iowa 728, (733) 133 N. W. 725)

CONCLUSION

The property condemned represents an investment of public funds aggregating many thousands of dollars. It had no market value, but that does not relieve the condemnor from the obligation to make payment of compensation, measured by the fair value of the property taken. As to what that value is, the record shows only the evidence offered in the testimony of Petitioners' witnesses. The determination by the District Court was below the lowest of those estimates. With such property, called by Orgel, "service property" evidence of replacement cost is peculiarly appropriate, and such evidence was offered and considered by the Court.

The position of the Circuit Court of Appeals, that compensation on this basis is unwarranted because the local taxpayers will not hereafter be required to maintain the roads is untenable. Any such rule would deny compensation to owners of many kinds of property other than public roads.

The theory of condemnation law is that the condemnee must be made whole. In this case, the recovery was based upon that theory. The Tennessee Valley and other cases relied upon by respondent are readily distinguishable on the facts. In the Tennessee case, the Court rightly held that the condemnee had been made whole by the condemnor's providing substitute roads at a cost far in excess of the value of the roads taken.

In this case respondent is not shown to have provided substitute roads and, at the trial, it successfully prevented petitioners showing either the necessity for or the cost of such substitute roads.

The decision of the Circuit Court of Appeals suggests a Governmental policy which is clearly unsound, if we desire to perpetuate our system of dual sovereignty.

While we contend that the proper measure of damages was employed in the District Court and that the judgment

based thereon was fair, yet if a different measure should have been used, its use was prevented by the objections of Respondent. Under such circumstances, the decision of the Court of Appeals, remanding the case for trial on the theory which Respondent had repeatedly opposed in the Court below, was error. That decision should be reversed and the judgment of the District Court reestablished.

Respectfully submitted,

B. C. CONN,
Burlington, Iowa,

J. A. DAILEY, JR.,
Burlington, Iowa,

J. C. PRYOR,
Burlington, Iowa,

Attorneys for Petitioner, Des Moines County, Iowa.

JOHN HALE,
Burlington, Iowa,
Special Assistant Attorney General of Iowa,

Attorney for Petitioner, State of Iowa.

APPENDIX

(Section Nos. refer to 1939 Code of Iowa)

4560 "The board of supervisors has the general supervision of the secondary roads in the county, with power to establish, vacate and change them as herein provided, and to see that the laws in relation to them are carried into effect."

4644.01 "The duty to construct, repair, and maintain the secondary road and bridge systems of a county is hereby imposed on the board of supervisors."

4644.06 "The board of supervisors may, annually, at the September session of the board, levy, for secondary road construction purposes, a tax of not to exceed one-half mill on the dollar on all the taxable property in the county, except on property within cities which control their own bridge levies."

4644.07 The board may, also, levy, for construction purposes, a tax of not to exceed five-eighths mill on the dollar on all taxable property in the county except on property within cities and towns.

4644.08 "The secondary road construction fund shall consist of:

"1. All funds derived from the aforesaid construction levies, and

"2. All funds allotted to the county from the state tax on motor vehicle fuel, and

"3. All funds received by the county from the state as refunds for bridges, culverts, and rights-of-way on primary roads, not already anticipated by county, and

"4. All other funds which may be dedicated by law to said fund, and shall be used and employed as herein provided."

4644.11 "The board of supervisors may, annually, at the Sep-

tember session of the board, levy, for secondary road maintenance purposes, the following taxes:

"1. A tax of not to exceed one and one-fourth mills on the dollar on all taxable property in the county, except on property within cities which control their own bridge levies, and

"2. A tax of not to exceed three mills on the dollar on all taxable property in the county, except on property within cities and towns."

4644.11 as amended (Ch. 136, Sec. 1 — 51 G. A.)
"The board of supervisors may, annually, at the September session of the board, levy, for secondary road maintenance purposes, the following taxes:

"1. A tax of not to exceed two mills on the dollar on all taxable property in the county, except on property within cities and towns which control their own bridge levies, and

"2. A tax of not to exceed five mills on the dollar on all taxable property in the county, except on property within cities and towns."

4644.12 "The secondary road maintenance fund shall consist of

"1. All funds derived from the aforesaid maintenance levies, and

"2. All funds allotted to the county from the state tax on motor vehicle carriers, and shall be used and employed as herein provided."

INDEX

CITATIONS

664785—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 333

DES MOINES COUNTY, IOWA, AND STATE OF IOWA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 35–46) is not reported. The opinion of the circuit court of appeals (R. 326–329) is reported in 148 F. (2d) 448.

JURISDICTION

The judgment of the circuit court of appeals was entered on April 24, 1945 (R. 329–330). The petition for rehearing was filed on May 8, 1945 (R. 331–336) and denied on May 23, 1945 (R. 337). The petition for a writ of certiorari was filed on August 17, 1945. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the obligation to pay just compensation for the taking of a highway easement is satisfied by the cost of providing necessary substitute roads.

STATEMENT

This case arose from condemnation proceedings instituted on June 18, 1943, to acquire 48.25 miles of secondary roads and highways within the Iowa Ordnance Plant (R. 1–9) in Des Moines County, Iowa. A declaration of taking was filed the same date pursuant to the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. sec. 258a, $1.00 being deposited as estimated compensation (R. 11–14).

Des Moines County and the State of Iowa, both of which asserted a determinable fee title to the roads, filed claims for compensation for the "real estate" to the same extent as if title were in fee simple absolute, fixing the value of the physical property taken, including bridges, culverts, surfacing and other improvements at approximately $182,000 (R. 31–32, 49). In addition, the county claimed $106,281 for the construction of "further highways" to provide access for the owners of farm lands, particularly in the vicinity of the Skunk River which is subject to periodic overflow (R. 33–34), and the state claimed $118,000 for

"damages occasioned to the remainder" of the highway system measured by the cost of relocating highways around the Ordnance area, including repairs to the Skunk River road (R. 50).

At the trial without a jury, the court limited defendants' proof to the "fair and reasonable value of what is taken" (R. 57) as distinguished from what the court called "resulting damages" (R. 56), namely, the claims of the county and state for further highways outside the area (R. 59, 60–62). Hence the evidence produced by defendants was directed solely to the cost of replacement of the highways, including bridges and culverts, less certain allowances for depreciation (cf. R. 79, 105, 112, 153, 155, 157, 160–161, 291–292, 296, 297). To all such testimony of value the Government objected (R. 157, 165, 166, 169, 291, 292, 296–297) on the theory that it did not tend to prove the proper measure of compensation. Accordingly, at the close of the trial it moved to strike all testimony giving a valuation in whole or in part to the roads, bridges and culverts lying within the area (R. 305–306). The objections and motion were overruled.

Although it pointed out that there might be instances where the county would be entitled to an alternate highway (R. 64), the position of the Government at the trial was that the proper measure of compensation was nominal value (R. 297, 306) because Iowa law compelled neither the

county nor the state to provide substitute roads (R. 77; cf. R. 105, 167, 168). The trial court agreed with the Government's view that there was no enforceable duty to provide substitute roads (R. 62–63). Thus when defendants offered to prove that the cost of making the Skunk River passable throughout the year would be $118,000 (R. 167) and that such construction was necessary (R. 72–77), the Government objected on the same theory that it had objected to proof of the actual value of the roads taken within the area—that only nominal damages could be recovered (R. 77, 167, 297, 306). The court sustained the objections, but for the reasons that the landowners affected lived outside the area (R. 77–78) and that recovery of the cost of improving the River road would constitute "double damages" (R. 167).

Basing its conclusion upon the evidence as to cost of reproduction, the district court found that the fair value of the roads taken, including all improvements, was $175,000, and that the state was entitled to the award (R. 306–309). Judgment was entered accordingly (R. 309).

Upon appeal by the Government, the circuit court of appeals held that the cost of providing necessary substitute roads, rather than the replacement value or reproduction cost of the roads taken, was the proper measure of compensation. Accordingly, the judgment was reversed and the cause remanded to the district court with directions to

ascertain and award the petitioners (or whichever of them is entitled thereto) the cost of providing substitute roads, if any, needed to replace the roads taken (R. 329–330). The circuit court of appeals in its opinion (R. 326–329) rejected the contention made by the Government at the trial and on appeal, that only nominal damages were payable because Iowa law did not impose upon the local authorities a legally enforceable duty to provide substitutes, holding that when new roads are necessary it is of no legal consequence whether the duty to provide substitutes is express or implied or arises from necessity (R. 328). On the ground that the error of the district court in rejecting evidence was too plain and vital to be ignored where the public interest is involved, the court below likewise rejected petitioners' argument that the error was induced by the Government and hence furnished no ground for reversal (R. 328–329).

ARGUMENT

1. Petitioners' complaint is almost entirely based upon the assertion that their property is being taken without compensation (see, *e. g.* Pet. 7, 9, 13, 16–17), but no such case is presented here. Upon remand, petitioners will have ample opportunity to prove that substitute roads are necessary and to prove the cost of furnishing such substitutes. Thus, the issue presented really is whether the cost of substitute roads, instead of replace-

ment value or reproduction cost of the roads taken, is the proper measure of compensation. In *Brown* v. *United States,* 263 U. S. 78, 83, this Court recognized that substitution in kind was the best method of providing compensation when streets and alleys are taken, stating "A method of compensation by substitution would seem to be the best means of making the parties whole." (Cf. Pet. 4, 6, 22.) The decisions of the federal courts have uniformly recognized that the only right arising from the taking of highway easements is a right of exoneration from the cost of constructing whatever substitute roads may be necessary. Just compensation to a county for roads taken is measured by the cost of making the necessary readjustments in its road system. *Jefferson County, Tennessee* v. *Tennessee Valley Authority,* 146 F. (2d) 564, 566 (C. C. A. 6), certiorari denied April 9, 1945, October Term, 1944, No. 1020; *Mayor and City Council of Baltimore* v. *United States,* 147 F. (2d) 786, 790 (C. C. A. 4), affirming *United States* v. *Certain Parcels of Land,* 54 F. Supp. 667 (D. Md.); *Wayne County, Kentucky* v. *United States,* 53 Ct. Cl. 417, affirmed, 252 U. S. 574; *Town of Nahant* v. *United States,* 136 Fed. 273 (C. C. A. 1); *United States* v. *Town of Nahant,* 153 Fed. 520 (C. C. A. 1); *Town of Bedford* v. *United States,* 23 F. (2d) 453 (C. C. A. 1); *United States* v. *Wheeler Township,* 66 F.

(2d) 977 (C. C. A. 8); *United States* v. *Alderson*, 53 F. Supp. 528 (S. D. W. Va.).

Where there is no need to provide a substitute highway or where an existing substitute is adequate, only nominal damages are recoverable for the taking of the highway easement. *Mayor and City Council of Baltimore* v. *United States*, 147 F. (2d) 786, 790 (C. C. A. 4); *United States* v. *Alderson*, 53 F. Supp. 528, 531 (S. D. W. Va.); *United States* v. *Prince William County*, 9 F. Supp. 219, 221 (E. D. Va.), affirmed, 79 F. (2d) 1007 (C. C. A. 4), certiorari denied, 297 U. S. 714; cf. *United States* v. *Certain Parcels of Land*, 45 F. Supp. 899, 900, 902 (E. D. Wash.)

The policy behind these decisions is clear. Roads have no market value. They are of value to a county only to the extent that they enable it to meet its obligations to its citizens. Neither the original cost nor the reproduction cost of the roads taken bears any relation to the amount of the loss. The readjustment of its road system may cost the county substantially more or substantially less than the replacement cost of the roads taken. If more, the county would not be made whole by a payment based on the reproduction cost of the roads taken; if less, it would receive an unwarranted windfall. It is this windfall for which petitioners here contend. In their answers, the county and state admitted that the cost of substi-

tute roads would not exceed $106,000 and $118,000, respectively (R. 33–34, 50). Under the foregoing authorities (*supra,* p. 6), such was the maximum value of the highway easements in question. Petitioners seek to distinguish some of these authorities on the ground that there the cost of relocation was more than the cost of reproduction. (Pet. 13–15, 22). Certainly there is nothing to support petitioners' contention that they are entitled to whichever is more expensive as between cost of relocation and cost of reproduction. The fallacy in petitioners' argument (Pet. 7) that if value is measured by the cost of substitutes the state would receive nothing for roads costing millions of dollars lies in the fact that such large sums would not have been expended on roads unless they were necessary and, hence, upon the taking the United States would be required to pay the cost of a substitute.[1]

Petitioners contend, in support of their theory that the cost of a substitute road is not just compensation, that their rights in these roads, although in the nature of easements, were the same as a fee so long as they were exercised. They cite cases (Pet. 12) wherein the fee title to land was conveyed to the grantee so long as it was

[1] It is to be noted that State Primary highway No. 16 was vacated and no claim to compensation is involved here as to that road (R. 23, 67–68).

used for a certain purpose, and the land was valued upon condemnation as though it were an absolute fee because the event upon which the possessory estate in fee simple defeasible was to end was not likely to occur within a reasonably short time. Under Iowa law the abutting owners had the existing fee title, and upon abandonment of the roads the unencumbered use would vest in them and not in petitioners. *Clare* v. *Wogan*, 204 Iowa 1021, 1024; *Kitzman* v. *Greenhalgh*, 164 Iowa 166, 169. For purposes of valuation, the limitation to highway uses cannot be disregarded and the land treated not only as though it were owned in fee simple but also as though it could be used by petitioners for any purpose. Whatever the state of the title, petitioners used the property only for purposes of a road, and it must be deemed that they would continue to use it only for those purposes. *Chicago, Burlington, Etc. R'd* v. *Chicago*, 166 U. S. 226, 250–251; cf. *Mayor and City Council of Baltimore* v. *United States*, 147 F. (2d) 786, 789 (C. C. A. 4).

2. Petitioners' complaint (Pet. 17–21) that the error was induced by the United States is simply an attack upon the execise by the court below of the discretion which it possesses to correct plain errors in spite of procedural deficiencies. There can be no question that power to do so exists (*Hormel* v. *Helvering*, 312 U. S. 552, 556–557;

United States v. *Harrell,* 133 F. (2d) 504, 506–507 (C. C. A. 8); *United States* v. *Certain Parcels of Land, Etc.,* 144 F. (2d) 626 (C. C. A. 3)) and we submit that, under the circumstances, it was properly exercised. Moreover, the error was not, as petitioners assert, induced by the Government nor did it change its position upon appeal. Pursuant to its contention that only nominal damages were payable, the United States objected to all of petitioner's evidence. Furthermore, petitioners claimed both the cost of substitutes and cost of reproduction (R. 29–35, 48–50). The Government's motion to compel them to elect between these two claims having failed (R. 46–47, 51–52, 56), objection was made to the evidence offered by petitioners to support each claim in order to preserve the Government's position that petitioners could not recover both items. It was the trial court, not the Government, that stated the erroneous theory that to allow the substitution evidence would permit the recovery of consequential damages (R. 61–62). Thus, the Government did not agree with the trial court's conclusion that the cost of reproduction was the proper measure of compensation, and objection to evidence in support thereof was preserved in every way possible (R. 157, 165, 166, 169, 291, 292, 296–297, 305–306). It cannot be said, therefore, that the error in valuing the roads on a reproduction theory was induced by the United States.

CONCLUSION

The decision of the circuit court of appeals is in accordance with established principles of law. There is no conflict of decisions. It is therefore respectfully submitted that the petition should be denied.

HAROLD JUDSON,
Acting Solicitor General.
J. EDWARD WILLIAMS,
Acting Head, Lands Division.
ROGER P. MARQUIS,
KELSEY MARTIN MOTT,
WALTER J. CUMMINGS, JR.,
Attorneys.

SEPTEMBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945